John W. McGrath Corporation v
trict, ILA, 80-CV-150 (N.D.N

Latrobe Steel Co. v. *United Steel*
AFL-CIO, 545 F.2d 1336 (3r

New Orleans Steamship Asso
Longshoreworkers ILA, 626
1980) .....

NLRB v. *Keller-Crescent Co.*, 53
1976) .....

United States Steel Corp. v. *Un*
America, 548 F.2d 67 (3rd C

United Steelworkers of America
facturing Corp., 363 U.S. 5

Statutes

29 U.S.C. § ~~101~~ 104 .....

Docket No. 80-1058

IN THE

eme Court of the United States

OCTOBER TERM, 1980

?TON ROADS SHIPPING ASSOCIATION, et al.,

and

RGILL, INC. and ROGERS TERMINAL AND SHIPPING CORPORATION,

Petitioners,

v.

ATIONAL LONGSHOREMEN'S ASSOCIATION, et al.,

and

ILA LOCAL 1248, et al.,

and

ILA LOCAL 1963, et al.,

Respondents.

ION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

F FOR RESPONDENTS IN OPPOSITION

ndents International Longshoremen's Association, O ("ILA") and its affiliated locals and officers re- y request that the Court deny the Petition for a Certiorari seeking review of the Fourth Circuit's in this case. The opinion below is reported at 282 (4th Cir. 1980) and is reproduced at Petition, *eq.*

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January 9, 1980 ILA
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On appeal, the Court of Apeals for the F
reversed and vacated the preliminary inju
authority of *Buffalo Forge Co.* v. *United St*
America, AFL-CIO, 428 U.S. 397 (1976)
"*Buffalo Forge*"). Petitioners now seek a wri
from this Court to review the Fourth Circui

ARGUMENT

1. This Case Does Not Present Any Issue Review by the Supreme Court

As demonstrated below, the decision for wh
sought is no more than a straightforward
difficult application of the principle establish
Forge, supra. The interpretation of the *B*
decision by the Fourth Circuit is neither
novel. The Third, Fifth, and Seventh Circ
pressed a similar understanding of that ca
Steel Co. v. *United Steelworkers of Americ*
545 F.2d 1336, 1341 (3d Cir. 1976); *United*
Corp. v. *United Mineworkers of America*, 54
(3d Cir. 1976); *Jacksonville Maritime Assoc*
International Longshoremen's Association, A
F.2d 319, 325 (5th Cir. 1978); *NLRB* v. *K*
Co., 538 F.2d 1291, 1295 (7th Cir. 1976). Th
first time that the Fourth Circuit has interp
Forge in this manner. *See Cedar Coal C*
Mineworkers of America, 560 F.2d 1154, 11
1977).

That the application of *Buffalo Forge* to th
this case was not unusual is witnessed by th
still another circuit with respect to the same
involved here. In *New Orleans Steamship A*
General Longshoreworkers ILA, 626 F.2d 4
1980), the Fifth Circuit, on the strength of *B*
reversed a pre-arbitration injunction issued

court in Jacksonville, Florida to restrain the ILA's refusal to handle Russian cargo there.* Like the decision for which review is sought here, the Fifth Circuit held that, since the underlying dispute is between the ILA and the USSR and thus is not subject to arbitration, no injunction may issue prior to an arbitrator's ruling as to the arbitrability of the resulting question of whether the ILA's response to the non-arbitrable dispute violates the no-strike clause. *Id.*, 626 F.2d at 467.

The District Court for the Northern District of New York applied an identical understanding of *Buffalo Forge* to still another case arising out of the ILA action. *John W. McGrath Corporation* v. *Atlantic Coast District ILA*, 80-CV-150 (N.D.N.Y.). The court's unreported opinion is reproduced in the appendix to this brief.

Thus, there is no conflict among the circuits as to the law. There is no confusion or uncertainty about the meaning of this Court's prior decisions. The two circuits which have addressed the factual situation of this very case are in perfect accord.

Indeed, it would seem that petitioners do not claim that the Fourth Circuit is in error as to the law, merely that it misapplied the law to the facts of this case. Petitioners recognize that

> in the Fourth Circuit's view, the underlying cause of the work stoppage was the Union's disagreement with the Soviet Union over its actions in Afghanistan. Once the appellate court reached that conclusion, it would follow that such a dispute was outside the scope of the contract, and could not be resolved by an arbitrator. (Petition, 23)

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* A petition for a writ of certiorari to the Fifth Circuit is presently pending. No. 80-1045.

They claim merely that the Fourth Circuit's characterization of the underlying dispute disregards the evidence. As shown below, petitioners' claim is without merit. Even if petitioners' claim had some basis in fact, it would provide no ground for review by this Court. That a circuit has made an isolated error of fact by misreading the evidence is hardly of such significance that it calls for Supreme Court correction.*

Petitioners' misgivings that the Fourth Circuit's decision will lead to confusion in the district courts and chaos in labor-management relations are without foundation. The wisdom and efficacy of the holding in *Buffalo Forge* is borne out by the fact that, with respect to the ILA/USSR dispute, the issue of violation of no-strike clauses has been submitted to arbitration without prior interference by the courts in as many instances as pre-arbitration injunctions have been sought. In each instance the arbitrator found a violation of the particular no-strike clause and ordered the Union back to work. *See*, e.g., *New Orleans Shipping Association* v. *ILA*, *supra*, 626 F.2d at 460.

Finally, the argument that the policy favoring arbitration of labor disputes has been jeopardized is not well taken. On the contrary, this Court has repeatedly recognized that the no-strike clause is the *quid pro quo* for an agreement to arbitrate. *Boys Markets*, *supra*, 398 U.S. at 248; *Buffalo Forge*, *supra*, 428 U.S. at 407, 419; *United Steelworkers of America* v. *American Manufacturing Corp.*, 363 U.S. 564, 567 (1960). It follows that to enforce a no-strike clause where, as here, the underlying issue cannot be resolved by arbitration is to deprive a union of

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* The fact that the ILA refusal to service the Soviets applies to all ports in the eastern United States does not elevate the issues in this case to national importance. In the year it has been in effect, it has given rise to the granting of only two employer-sought injunctions (Hampton Roads and Jacksonville), and the denial of one (Albany, New York).

both its economic and contractual methods of resol disputes. Any approach other than that of the Fo Circuit and of *Buffalo Forge* can only deter unions f agreeing to broadly worded arbitration/no-strike clau with the inevitable result of practically undermining policy favoring arbitration.

2. The Fourth Circuit Correctly Applied the Doct of *Buffalo Forge*

The Fourth Circuit found that the ILA's primary pute is with the Soviet Union over the invasion Afghanistan.* It correctly held that this dispute does fall within the arbitration clauses of the collective berg ing agreements here, since it "cannot be resolved by arbitrator." 631 F.2d at 285. The court then corre held that, since the underlying dispute was not arbitra an injunction could not issue under the exception to No LaGuardia § 301[4] enunciated by this Court in *I Markets, supra.*

The Court further recognized that under the decisio *Buffalo Forge, supra,* the union's striking over the arbitrable dispute generated a second dispute as to whe such action violated the express no-strike clauses of collective bargaining agreements. Whether the second pute was arbitrable involved a matter of construing

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* Eight other United States Courts which have passe various aspects of the ILA action are in unanimous agreeme to the nature and participants of the underlying dis Describing the same dispute, the Fifth Circuit has said:

> The ILA's dispute is exclusively with the Soviet govern which is the only authority capable of responding t protest. *Baldovin* v. *International Longshoremen's As tion, AFL-CIO*, 626 F.2d 445, at 449 (5th Cir. 1980). *also, John W. McGrath Corporation* v. *Atlantic Coast trict, ILA*, 80-CV-150 (N.D.N.Y.) at Appendix A7.

contract and so was itself a matter to be decided by t arbitrator. Following the express direction of this Cou in *Buffalo Forge, supra,* 428 U.S. at 410, the Fourth C cuit held that no injunction could issue prior to a decisi by the arbitrator. 631 F.2d at 286. The circuit cou recognized that the district court's finding of a violati of the no-strike clause usurped the function of the ar trator and that the issuance of an injunction prior completion of arbitration was legal error.*

On the present application, petitioners would distort tl rather uncomplicated application of the holding of *Buff Forge* by urging a series of purported distinctions. Ev if well taken, petitioners' arguments would hardly prese the kind of issues that warrant review by this Cou Moreover, the arguments themselves are untenable.

Petitioners urge that the district court, after consid ing the opinion in *Buffalo Forge,* made a finding of fa based on the evidence that the primary dispute in this ca was between the unions and the employers and so subj to arbitration and susceptible of a traditional *Boys Ma ket* injunction. The district court's opinion does not su port such a reading. The determinative finding of t district court is set forth in paragraph 14:

> The Union's action in ordering its members to refu to work Soviet vessels or vessels engaged to car grain bound for the Soviet Union calling at the Port Hampton Roads is in violation of the no-strike pro sions of its agreements with HRSA and Carg (Petition A18)

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* In its order the Fourth Circuit directed that the issue violation of the no-strike clause be submitted to arbitration. T arbitration was held on December 19, 1980. No decision h been rendered as yet.

In the entire opinion there is no mentio
Forge. There is no finding that the union
to arbitrate a dispute which was capable of
Indeed, there is not, as petitioners would
analysis of the primary dispute or any findi
between the parties to the collective bargaining

Likewise, the claim that the district cou
(nonappearing) evaluation of the underlying
some evidentiary finding, as to which the ap
later usurped its function, simply finds no su
record. On the contrary, it is quite appar
district court, like every other court, was we
the primary dispute here is between the U
Soviet Union over the latter's military policy.
makes repeated reference, in paragraphs 10, 1
16, to the "foreign policy" aspects of the di
disregard of the Russian dimension would
myopia.

The "evidentiary" hearing to which peti
was nothing more than the introduction of
bargaining agreements and the Gleason staten
with testimony to establish a refusal to handl
Roads and evidence as to damages. Neith
tempted to introduce evidence with respect to
the work stoppage because it was self-evi

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* The ILA has consistently disclaimed any in
upon the making of foreign policy. President C
prohibits certain trade. It does not mandate a
Each individual and group is still free in the pr
act according to his own lights in determining w
participate in the still permissible commerce. T
of Russian caviar is still permitted. No one is th
to eat caviar. Moreover, the ILA action is self-
no more than a refusal in conscience by longs
selves to service the aggressors. No attempt has
persuade others to do likewise.

disputed.* In fact, what petitioners seek and district court may have done *sub silentio* and Fourth Circuit rejected was to *arbitrarily chara* dispute as being between the union and manage effort to avoid the plain dictates of *Buffalo For*

Petitioners seek to capitalize on the circuit co ment to the effect that the district court's dec based primarily on a 'management clause' in th bargaining agreement." 631 F.2d at 284, and this factor distinguishes this case from *Buff* The argument is without support.

With all deference to the Fourth Circuit, it incorrect to say that the district court relied o agement clause. It's opinion neither recites no a management clause. On the contrary, the di held in paragraph 14 of its opinion that the unic violated the *no-strike* clause. True, the lowe incorporate its remarks from the bench, whe discussed the management clause, but this wa graph 18 of the opinion which refers to the of the four crietria for equitable relief, not to t on the merits.

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* Petitioners' allusions to the district court's con respondents had not established by evidence that the was the will of the membership is totally irrelevant was raised by the court *sua sponte* in another context, an injunction would violate First Amendment rights. finding was based not on evidence but on uninform by counsel. The only evidence at all on this matter is statement which asserts that the union's action was the membership. Evidence in other proceedings est the ILA's action was prompted by and in confirm sentiment of its members. For whatever it is worth, court's finding is irrelevant to the nature of the un pute. On the question of arbitrability, it matters the dispute is between the union and the Soviets or b vidual longshoremen and the Soviets. Neither dispu resolveable by arbitration.

Any reliance on the management cl
able. Only the Cargill agreement, w
Local 1643 non-longshore employees,
ment clause. The HRS Agreement
the district court had relied on "ma
injunction could have applied only to
not to members of Local 1248.* The c
have relied on the management clause
junction it did, which was directed
and prohibited the work stoppage ag
HRSA (Petition A22, A23).

Nor can a characterization of the
attempt to invade management's right
The ILA's concern in this matter is
cipation in the Soviet enterprise. W
do, longshoremen wish not to service
selves. They have made no attempt
of other unions, businesses, or the pu
not punish anyone whose conscience
does not refuse to handle the non-S
companies who are notorious for tr
sians. It does not withhold services
continue to carry Russian goods, as l
do not have to handle them. It do
prisals against those employers who
action by diverting vessels to foreig
where the refusal to handle has b
Baldovin v. *International Longsho*
AFL-CIO, supra, 626 F.2d at 452.)
this as a dispute between the union
over management's rights would be

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* Such an injunction would, in practic
since the grain, after handling by Cargill
be handled by longshoremen to be loade
latter were not enjoined, Cargill's grain sti

Moreover, as the Fourth Circuit rea
reliance on a management clause would
calculated effort to avoid the holding
Management rights are being violated, i
work stoppage and it is only the work st
sought to enjoin. Thus, it is really
no-strike clause which is complained o
leading label of "management rights" i
Buffalo Forge, it would still be for the
whether striking over a non-arbitrabl
management rights. All questions of
construction of the contract are for th
court in *Buffalo Forge* expressly reje
that a pre-arbitration injunction may
one of the parties claims that some arbi
the contract is at issue. (*Buffalo For*
at 408, n. 10).

The only aspect of the present case
fours with *Buffalo Forge* is that the
here does not involve a sympathy st
Circuit correctly declined to limit *Buf*
situation. In this it was on solid gro
factor in *Buffalo Forge*, as here, was t
dispute was not one which the union
bound to arbitrate. It would be absur
under the broadest arbitration claus
arbitrable disputes are sympathy strike

The criteria employed by this Court i
determine non-arbitrability of the u

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* An example of a non-arbitrable dispu
volve a sympathy strike arose in *Armco S*
Mineworkers of America, 505 F.2d 1129 (
denied 423 U.S. 877 (1975). Significantly,
the very decisions mentioned in *Buffalo Forg*
fliet among circuits that certiorari was grant
Forge, supra, 428 U.S. at 404, n. 9.

apply equally to the present
not gone on strike by reason
bers have with the employer.
but over a dispute with the
not *over* any dispute betwee
that was even remotely subj
contract." 428 U.S. at 407.
issue underlying it was sub
cedures provided by the con
and respondents" 428 U.S. 4
neither the purpose nor affe
obligation to arbitrate or of d
bargain." 428 U.S. 408, 409.

That the instant petition s
already decided by this Cour
set forth at page 4 of the pe
question posed in the *Buffal*
in that case. 428 U.S. at
answered in the negative. 4

No amount of attempted di
tion can hide the fact that wh
what the district court did by
own finding that the no-strike
to adopt the position of the di
position was expressly rejec
Court. 428 U.S. at 412. The
in reversing and vacating the

CONCLUS

For all of the reasons state denied.

Respectfully s

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